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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the Matter of the Petition of Genwal Resources, Inc. for Review of Division Order DO10A, Crandall Canyon Mine	**DIVISION'S RESPONSE TO GENWAL'S PETITION FOR RECONSIDERATION OF WATER TREATMENT BOND STRUCTURING** Docket No. 2010-026 Cause No. C/015/0032

The Utah Division of Oil, Gas and Mining (the "Division") hereby responds to Genwal's Petition for Reconsideration of Water Treatment Bond Structuring as follows.

1. **Genwal's Petition does not comply with the Board's requirements for a Petition for Rehearing or Modification and should not be considered.**

A Petition for Rehearing and Modification of Existing Orders must set forth the particular ways in which the Board's order or decision is claimed to be unlawful, unreasonable, or unfair. (Utah Admin. Code R641-110-200, Procedural Rules of the Board.) If the petition is based on a claim that the Board failed to consider certain evidence, it must include an abstract of that evidence. Id. If based on claims of newly discovered evidence it must include an affidavit setting forth the nature and extent of

such evidence, its relevancy to the issues involved, and a statement as to why the party could not have discovered the evidence prior to the hearing. Id.

Genwal's Petition does not satisfy these requirements. Genwal does not claim the Order is unlawful, unreasonable or unfair. At best, it appears Genwal claims there is new evidence (Petition, at 4). It appears Genwal considers its reclamation audit and the completion of reclamation work (that may allow it to apply for a partial release of bonding) to be new evidence. The inability of either the Division or the Board to consider these claim now is addressed in point 2, but even if the claims were ripe for consideration and true, there is no affidavit explaining why this "new evidence" was not available prior to the hearing. The reclamation work for which a release is sought was completed last summer, and Genwal does not explain why its audit could not have been completed earlier since there has been no change in surface disturbance since the mine disaster. More significantly, the Petition fails to explain how the amount of the current bonding is related to the issues raised and decided by their Request for Agency Action. There is no affidavit (as required by the rule) explaining the relevance this alleged new evidence has to the issues involved in the hearing and decided by the order.

Genwal's Petition does not comply with the Board's requirements for a Petition for Rehearing or Modification and should not be considered.

2. Genwal's Petition improperly asks the Board to decide issues that were not raised as part of the adjudication and that are not ripe for a decision by the Division or by the Board.

As a justification for the requested reduction in amount, Genwal claims (1) it has conducted an audit of the estimated reclamation costs for the Crandall Canyon Mine and

that the current bond amount as determined by the Division is excessive; and (2) it has completed reclamation work on an area disturbed by prior mining and that the bond for that work can be partially released. Neither of these issues were raised or adjudicated during the hearing in the case. In a Petition for Reconsideration it is inappropriate to ask the Board to determine issues that were not raised or addressed by the case in chief. (*National Advertising Co. v. Murray City Corp.*, (2006) 131 P.3d 872) The only issues presented in the original Division Order and challenged by the Request for Agency Action were the authority to require a bond for water treatment costs and the amount of bonding needed for this purpose based on hydrologic studies. During the extensive period that this matter was argued before and considered by the Board, the adequacy of the existing bonding was never raised by Petitioners. This Petition is an attempt to present new arguments that are not a basis for reconsideration of the Board's Order in the guise of new evidence in order to reduce the amount of the bond. Genwal will be not prejudiced if the Board does not consider these claims now because Genwal is free to pursue new claims to adjust the amount of current bonding as permitted by the rules. The Board correctly limited its inquiry to the issues raised by the pleadings and there is no reason to re-open the hearing.

In addition, these alleged new claims are not ripe for adjudication. Both of these new issues regarding the adequacy of the current bonding require that Genwal and the Division comply with preliminary procedures. Genwal must comply with theses procedures before any action can be taken to determine if there is an excess amount of bond that might be applied to satisfy bonding for water treatment costs. These required procedures have not even been initiated. These procedural steps are mandatory

prerequisites to bringing the questions to the Division, and a decision by the Division is a mandatory prerequisite to consideration by the Board.

Specifically, a requests for a reduction in the amount of a performance bond, must be initiated through a formal request by the permittee. (Utah Admin. Code R645-301-830.430). The amount of adjustment in bonding, if any, must then be determined by the Division and then this determination requires notice to the surety, and to others and must allow for an informal conference. (Utah Admin. Code R645-301-830.420 to 422) Similarly, a request for bond release requires a petition by the permittee, advertisement in a local newspaper for four successive weeks, inspection and evaluation by the Division, notice of the inspection and opportunity for the landowner to participate in the inspection, notice to others, and an opportunity for a public hearing. (Utah Admin. Code R645-301-880) None of these steps have even begun.

Furthermore, for a bond release, the Division's evaluation must consider "whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated costs of abating such pollution." R645-301-880.210. Uunder this standard no bond release would be appropriate until, at the very least, the pollution discharge has ceased. In any event this question is not ripe for consideration by the Board at this time.

3. Reconsideration to evaluate "water treatment bond structuring" could only result in a reduction of bonding below the amount already determined by the Board to be necessary and would therefore be arbitrary and capricious.

Genwal's Petition for Reconsideration asks the Board to reduce the amount of Bonding for water treatment costs from $720,000.00 to $480,000.00; i.e. from three years

of coverage for the stipulated costs of water treatment ($240,000.00/year) to two years of coverage. Genwal then proposes to establish an operating fund of $240,000.00 that would be used for current costs of water treatment and be replenished annually.

The Findings of Fact, Conclusions of Law and Order make it clear that the Board found that three year's operating expenses is the neccessary amount for a bond for water treatment costs and that Genwal will separately pay for the continued operation of the existing water treatment plant. Finding of Fact 70 states "3 years is an appropriate duration upon which to based a bond." Conclusion of Law 78 provides "the Board has determined that a bond in the amount of $720,000 will cover the water treatment costs in the event of a default by Genwal." Paragraph 3 of the Order provides "[T]he $720,000.00 bond will be held *undiminished* until iron concentrations in the untreated discharge have fallen below applicable UPDES discharge limits . . . ." (emphasis supplied)

Genwal's proposal to establish and draw from an operational account would effectively reduce the amount available in the event of default by Genwal by the amount used for operating expenses as of the date of a default. It is reasonable to expect that a default will occur when the obligation to replenish the account arises and will result in there being $240,000.00 less bonding than the Order says is necessary. Reducing the amount of bonding to less than three years would be an arbitrary and capricious disregard of the Board's own finding.

4. The Board's 'three-years of costs' bond is already inadequate as it fails to provide protection for the reasonable possibility that water treatment for a longer term will be needed.

The amount set by the Board is inadequate to fulfill the purposes of a bond. By definition a bond is to be used to "assure faithful performance of all the requirements of the Act." (Utah Admin. Code R645-100-200). The Board incorrectly determined the amount of the bonding based on what it found to be the expected duration of the "above-limit iron concentrations". (Finding 70) This is the wrong question and applies the wrong standard.

The Board's duty is to determine the amount of bond needed to *assure* full and faithful compliance with all of the requirements of the Act by the operator. (Utah Code § 40-10-15(1)) As stated by the Court in *West Virginia Mining Ass'n v. Babbit*, 970 F. Supp. 506 (1997) "A bedrock principle of SMCRA is the obligation of the mine operator to bear the costs associated with surface mining" (at 512) and "OSM consistently has demanded all reclamation costs, including water treatment, be covered . . . solely by the bond system funded by the coal operators and permittees . . . ." (at 517). If the Board believes there is a reasonable expectation that treatment may be needed for more than three years, then the amount of the bond required must be an amount that assures that the people of the State will not pay the costs of water treatment in the event the Board's reasonable expectation is wrong; i.e. if the water treatment is required for more than three years.

The Board's Order suggests it did conclude that a longer period of discharge was a reasonable expectation since it required the full bond amount to remain undiminished for the entire three years or until the pollution levels remain in compliance for six months. (Order, Paragraph 2) Apparently the Board concluded that Genwal's estimate might be wrong. However, and despite this apparent reasonable doubt, the Order only

requires an amount to cover three years of costs. It does not provide bonding to cover the possibility that Genwal may default during the first year *and* that the expected duration of discharge may exceed three years.

The Board failed to look at the issue as one of providing *assurance* of full compliance and instead looked at the question as if it were approving a budget for a future expense. This approach fails to satisfy the purpose and mandate for bonding as required by the Act.

The Division's expert argued that there is no evidence to show that the pollution will cease, and provided a critique of Genwal's conclusions that the pollution would diminish and cease. The Board found this analysis to be lacking in affirmative evidence and criticized its assumptions. Even if the Board is persuaded by Erik Petersen's reports that the pollution will decrease, it was anerror to base the bond amount on a what the Board thinks is a better reasoned prediction, rather than on the reasonable possibility that there may be a worse outcome. It may be reasonable to expect that pollution will decrease, but it is also *necessary* to consider a reasonable possibility that it will not decrease. The Division's proposed Amended Division Order requiring ten years of coverage with an incremental increase to a perpetual bonding amount, as warranted based on pollution levels during the ten year period, is a more realistic way to provide adequate bonding that will assure full compliance with the Act. Three years of coverage does assure compliance with the Act.

CONCLUSION

Genwal's Petition fails to satisfy the requirement that the Petition contain an affidavit explaining the relevance of alleged new evidence and why it was not available

during the hearing. Even if properly presented, the claims of new evidence are not relevant to the issues addressed in this matter by the Division's Order and the Request for Agency Action challenging that Division Order. The new issues regarding existing bonding were never raised in the proceedings leading to the Order. In addition, the claims of a right to a bond adjustment and a bond release are not ripe for consideration by the Board and require Genwal and the Division to take procedural actions prior to a final adjustment. Finally, the Petition should not be considered since it could only have the effect of reducing the amount of bond below the amount the Board has found to be necessary.

Separately the Division asserts that the Board erred as a matter of law by basing the bond amount on the "expected duration" of the polluted discharge. This is not the correct standard for deciding on the amount of bonding. Rather the Board should ask if there is a reasonable risk that water treatment may be required beyond three years and the Board should modify the amount of the required bonding to assure coverage in the event of that reasonable possibility.

Respectfully submitted this 19th day of April, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DIVISION'S RESPONSE TO GENWAL'S PETITION FOR RECONSIDERATION OF WATER TREATMENT BOND STRUCTURING was hand delivered, or mailed via U.S. mail, postage prepaid AND SENT BY EMAIL, to the following on this 19th day of April, 2012:

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